175

(3)

FILED

NOV 9 - 2010

OFFICE OF THE CLERK

No. 10-337

In The

Supreme Court of the United States

FAYUS ENTERPRISES, INC., *et al.*,

Petitioners,

v.

BNSF RAILWAY, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD J. FAVRETTO
ROBERT M. JENKINS III
GARY A. WINTERS
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondent BNSF Railway Company

Additional counsel on inside cover

ALAN M. WISEMAN
Counsel of Record
THOMAS A. ISAACSON
PETER A. BARILE III
HOWREY LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 783-0800
wisemana@howrey.com

Counsel for Respondent Union Pacific Railroad Company

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TYRONE R. CHILDRESS
DAVID G. MEYER
HOWREY LLP
550 South Hope St., Suite 1100
Los Angeles, CA 90071
(213) 892-1800

Counsel for Respondent
Union Pacific Railroad Company

KENT A. GARDINER
KATHRYN D. KIRMAYER
DAVID D. CROSS
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2500

Counsel for Respondent
CSX Transportation, Inc.

JOHN M. NANNES
TARA L. REINHART
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000

SAUL P. MORGENSTERN
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

Counsel for Respondent
Norfolk Southern Railway Company

QUESTION PRESENTED

Whether the court of appeals correctly concluded, consistent with the decisions of other circuit courts and with prior precedent of this Court, that Petitioners' state law antitrust, unfair competition and unjust enrichment claims directly challenging the fairness of Respondent railroads' rates and practices amounted to "regulation" of rail transportation that is preempted under the express terms of the ICC Termination Act of 1995?

RULE 29.6 STATEMENT

1. BNSF Railway Company

BNSF Railway Company is a wholly owned subsidiary of Burlington Northern Sante Fe Corporation ("BNI"), a publicly-held company.

Berkshire Hathaway, Inc. is the only publicly held company with a 10% or greater ownership interest in BNI.

2. CSX Transportation, Inc.

CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation.

CSX Corporation is a publicly held company. No other publicly held entity owns more than 10% of its stock.

3. Norfolk Southern Railway Corporation

Norfolk Southern Railway Corporation is a wholly owned subsidiary of Norfolk Southern Corporation, a corporation whose stock is publicly traded.

To the best of its knowledge, no entity has a 10% or greater ownership interest in Norfolk Southern Corporation.

4. Union Pacific Railroad Company

Union Pacific Corporation, a publicly-traded Utah corporation, owns 62.6% of Union Pacific Railroad Company, a Delaware Corporation.

Southern Pacific Rail Corporation, a Utah Corporation and a wholly owned subsidiary of Union Pacific Corporation, owns the remaining 37.4% of Union Pacific Railroad Company.

Union Pacific Corporation is a publicly held company. No publicly owned company owns 10% or more of Union Pacific Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

INTRODUCTION ..... - 1 -

STATEMENT OF THE CASE ..... - 4 -

A. Statutory History ..... - 4 -

B. Petitioners' Claims ..... - 7 -

C. The District Court Decision ..... - 8 -

D. The D.C. Circuit Decision ..... - 9 -

REASONS FOR DENYING THE PETITION ..... - 11 -

I. THE D.C. CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT ..... - 11 -

II. THE COURT OF APPEALS PROPERLY HELD THAT THE PLAIN LANGUAGE OF SECTION 10501(b) PREEMPTS STATE-LAW REGULATION OF RAILROAD RATES ..... - 17 -

III. THE PRESUMPTION AGAINST PREEMPTION DOES NOT APPLY TO RAIL REGULATION, AND EVEN IF IT DID, IT WOULD HAVE NO BEARING ON THE OUTCOME OF THIS CASE ..... - 22 -

CONCLUSION ..... - 25 -

TABLE OF AUTHORITIES

Cases

Adrian & Blissfield R.R. Co. v. City of Blissfield,
550 F.3d 533 (6th Cir. 2008) 12

American Airlines v. Wolens,
513 U.S. 219 (1995) 2, 24

Burlington N. Santa Fe Corp. v. Anderson,
959 F. Supp. 1288 (D. Mont. 1997) 20

Chicago & N. Western Transp. Co. v. Kalo Brick & Tile Co.,
450 U.S. 311 (1981) 2

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 13

City of Auburn v. United States,
154 F.3d 1025 (9th Cir. 1998) .....passim

City of Lincoln v. STB,
414 F.3d 858 (8th Cir. 2005) 12, 15, 19

City of Seattle v. Burlington N. R.R. Co.,
41 P.3d 1169 (Wash. 2002)..... 20

CSX Transp., Inc. v. City of Plymouth,
92 F. Supp. 2d 643 (E.D. Mich. 2000)..... 22

CSX Transp., Inc. v. Easterwood,
507 U.S. 658 (1993) 13

CSX Transp., Inc. v. Georgia Public Serv. Comm'n,
944 F. Supp. 1573 (N.D. Ga. 1996) 9, 20

CSX Transp., Inc. v. Williams,
406 F.3d 667 (D.C. Cir. 2005) 22

Emerson v. Kansas City S. Ry.,
503 F.3d 1126 (10th Cir. 2007) 12

Florida E. Coast Ry. Co. v. City of West Palm Beach,
266 F.3d 1324 (11th Cir. 2001) .....passim

Franks Inv. Co. LLC v. Union Pac. R.R. Co.,
593 F.3d 404 (5th Cir. 2010) .....passim

Friberg v. Kansas City Southern Ry. Co.,
267 F.3d 439 (5th Cir. 2001) .....passim

G & T Terminal Packaging Co. v. Consolidated Rail Corp.,
830 F.2d 1230 (3d Cir. 1987)..... 2, 5

Green Mountain R.R. Corp. v. Vermont,
404 F.3d 638 (2d Cir. 2005)..... 12, 19, 20

Guckenberg v. Wisc. Cent. Ltd.,
178 F. Supp. 2d 954 (E.D. Wisc. 2001) 14, 19, 20

In re Air Cargo Shipping Servs. Antitrust Litig.,
2008 U.S. Dist. LEXIS 107882 (E.D.N.Y. Sept. 26, 2008)..... 24

In re Korean Air Lines Co. Antitrust Litig.,
567 F. Supp. 2d 1213 (C.D. Cal. 2008)..... 24

Maynard v. CSX Transp., Inc.,
360 F. Supp. 2d 836 (E.D. Ky. 2004)..... 19

Medtronic v. Lohr,
518 U.S. 470 (1996) 13

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 2, 13, 24, 25

New York Susquehanna and W. Ry. Corp. v. Jackson,
500 F.3d 238 (3d Cir. 2007)..... 12, 13, 21, 24

Norfolk S. Ry. Co. v. City of Alexandria,
608 F.3d 150 (4th Cir. 2010) 12, 22

PCI Transp., Inc. v. Fort Worth & Western R.R. Co.,
418 F.3d 535 (5th Cir. 2005) 19

Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.,
297 F. Supp. 2d 326 (D. Me. 2003)..... 14, 19, 20

Port City Properties v. Union Pacific R.R. Co.,
518 F.3d 1186 (10th Cir. 2008) 19

Railroad Ventures, Inc. v. STB,
299 F.3d 523 (6th Cir. 2002) 20, 22

Riegel v. Medtronic,
552 U.S. 312 (2008) 3, 13

Rowe v. New Hampshire Motor Transp. Ass'n,
552 U.S. 364 (2008) 2, 24

Rubin v. United States,
449 U.S. 424 (1981) 23

Rushing v. Kansas City S. Ry. Co.,
194 F. Supp. 2d 493 (S.D. Miss. 2001)..... 20

San Diego Bldg. Trades Council v. Garmon,
359 U.S. 236 (1959) 3

San Luis Cent. R.R. v. Springfield Terminal Ry. Co.,
369 F. Supp. 2d 172 (D. Mass. 2005) 14

Soo Line R.R. Co. v. City of Minneapolis,
38 F. Supp. 2d 1096 (D. Minn. 1998) 20

Texas & Pa. Ry. v. Abilene Cotton Oil Co.,
204 U.S. 426 (1907) 2

United States v. Locke,
529 U.S. 89 (2000) 22

Village of Ridgefield Park v. New York Susquehanna & W. Ry. Corp.,
750 A.2d 57 (N.J. 2000) 19

Wisconsin Cent. Ltd. v. City of Marshfield,
160 F. Supp. 2d 1009 (W.D. Wis. 2000) 20

Statutes

49 U.S.C. § 10101 5

49 U.S.C. § 10102(9) 21

49 U.S.C. § 10501(b) ..... passim

49 U.S.C. § 10704 12

49 U.S.C. § 10709 4

49 U.S.C. § 11704 12

ICC Termination Act of 1995,
Pub. L. No. 104-88, 109 Stat. 803 ..... passim

Staggers Rail Act,
Pub. L. No. 96-448, 94 Stat. 1895 4

Legislative Materials

H. R. Conf. R. No. 104-422 (1995) 6

H.R. Rep. No. 104-311 (1995) 7

S. Rep. No. 104-176 (1995)..... 7

Rules

Sup. Ct. R. 14.4 10

Administrative Proceedings

Cities of Auburn and Kent, WA—Pet. for Dec. Order—
STB Fin. Dct. No. 33200, 1997 WL 362017 (July 1, 1997)..... 21

Friends of the Aquifer—Pet. for Dec. Order,
STB Fin. Dkt. No. 33966, 2001 WL 928949 (Aug. 10, 2001..... 20

North San Diego County Transit Dev. Bd.—Pet. for Dec. Order,
STB Fin. Dkt. No. 34111,
2002 WL 1924265 (Aug. 19, 2002) 20

Rail Fuel Surcharges,
STB Ex Parte No. 661, 2007 WL 201205 (Jan. 25, 2007)..... 12

INTRODUCTION

The United States Court of Appeals for the District of Columbia correctly applied a clear statute in a manner consistent with other courts of appeal. Therefore, Petitioners have failed to present a compelling reason for the Court to grant certiorari in this case.

The ICC Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, preempts Petitioners' state law antitrust, consumer protection, unfair competition and unjust enrichment claims. ICCTA amended Title 49 of the United States Code to provide:

> The jurisdiction of the [Surface Transportation Board] over ... transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules ... practices, routes, services, and facilities of such carriers ... is exclusive. Except as provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.
>
> 49 U.S.C. §10501(b).

This broad preemption provision reflects Congress' intent to ensure that the national rail network will continue to operate free of a patchwork of inconsistent state regulation. That network depends upon the uniformity of rules for the efficient shipment of goods between states, often over the lines of different interconnecting rail carriers. For over 100 years the national rail network has operated under comprehensive federal oversight,

consistent with a national transportation policy. The expansive federal role in regulating the rail system has left no room for challenges to rail rates and terms of service under state law. *See Texas & Pa. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (common law challenge to reasonableness of rail rates was preempted as inconsistent with Interstate Commerce Act); *Chicago & N. Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981) (state law claim for abandonment of rail line was preempted). The federal policy to preempt state law continued even as certain railroad activities were deregulated. *See G & T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230 (3d Cir. 1987) (post-Staggers Act common law claim for alleged unreasonable rail surcharge preempted). The need for uniform treatment of national transportation systems under federal law is also reflected in the prior opinions of this Court concerning preemption in the airline industry (*Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *American Airlines v. Wolens*, 513 U.S. 219 (1995)) and trucking industry (*Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008)).

Petitioners' state law claims attack directly the "fairness" of Defendants' fuel surcharges. Appendix to Petition ("App.") 20a. In affirming the district court's ruling dismissing these claims, the D.C. Circuit correctly decided that the claims attempted to "resurrect[ ] in a different form state-level regulation of railroads, by inviting judicial supervision of the reasonableness and fairness of rates charged to shippers." App. 24a. Indeed, as the circuit court noted, Petitioners candidly admitted in their pleadings that the real purpose of their state

law claims was to regulate Respondents' conduct. Petitioners asserted that their claims sought to "enforce" a ruling of the Surface Transportation Board ("STB") concerning *regulated* rail traffic by extending that ruling to "claims arising in private contract." App. 21a.

The circuit court's decision is in harmony — not in conflict — with the decisions of other circuit courts, which have identified economic regulation of transportation by rail carriers as the primary focus of ICCTA preemption. It is also in harmony — not in conflict — with the relevant decisions of this Court, which have held that state law damage claims were preempted in other industries because a damage award "can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Riegel v. Medtronic*, 552 U.S. 312, 324 (2008) (citing the same principle and discussing prior decisions to the same effect).

Moreover, the circuit court's conclusion that adjudication of Petitioners' state law claims would amount to state law regulation of rail transportation is solidly grounded in the language of the ICCTA preemption provision, which provides that the remedies concerning the "rates" and "practices" of rail carriers are exclusively within the federal regulatory province. 49 U.S.C. § 10501(b).

Additionally, any "presumption against preemption" does not apply where a state purports to act in an area that is historically subject to extensive federal regulation. Since its advent, rail freight transportation has been comprehensively regulated by the federal government. In any event, applying a presumption would not change the

outcome here, given the language of the controlling preemption statute. A presumption against preemption is irrelevant when Congress has expressed its intent to preempt in a statute.

The decision below is in accord fully with the prior precedent of this Court and other circuit courts. Both courts below correctly recognized that Petitioners' interpretation of the ICCTA preemption provision would open the door to state regulation of a national, networked transportation system, which Congress clearly intended to preclude. The Petition for Certiorari should be denied.

STATEMENT OF THE CASE

A. Statutory History

For almost 100 years, the Interstate Commerce Commission ("ICC") exercised comprehensive regulatory control over rail carrier rates and practices. In 1980, however, Congress passed the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"), which substantially deregulated the rail industry and for the first time permitted carriers to enter into private contracts with shippers. 49 U.S.C. § 10709.

In eliminating direct federal regulation for some categories of rail traffic in the Staggers Act, Congress did not open the door to state regulation of such shipments. As the D.C. Circuit correctly noted, the Staggers Act instead expressly codified the prevailing rule of federal preemption of state law (App. 9a-10a), by providing that "[t]he jurisdiction of

the Commission ... over transportation by rail carriers, and the remedies provided in this title *with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.*" Pub. L. No. 96-448, §214(c)(5), 94 Stat. at 1915 (emphasis added). This provision provided an express statutory basis for federal preemption of state law, even for traffic that is now deregulated. *See G. & T. Terminal Packaging*, 830 F.2d at 1234 (holding that the Staggers Act preempted common law rate remedies for traffic that was exempt from federal regulation).

ICCTA, passed in 1995, continued the process of deregulation. *See* 49 U.S.C. §§ 10101, *et seq.* ICCTA created the STB as a successor to the ICC to provide regulatory oversight with respect to some categories of rail traffic, and further limited the STB's authority to regulate private rail contracts. App. 14a. As with the Staggers Act, Congress did not intend ICCTA's deregulation provisions to open the door to state law challenges to rail carrier rates and practices, which had been precluded for nearly a century. *See G & T Terminal Packaging Co.*, 830 F.2d at 1234 ("From the time *Abilene Cotton Oil* was decided to date, no case has permitted a shipper to challenge a freight rate in a common law action"). To the contrary, ICCTA reenacted the expansive preemption clause, broadening it to eliminate a previous authorization for federally-certified state oversight, and supplementing the "exclusive jurisdiction" provision with the "exclusive remedies" clause. App. 13a-15a[1]

---

[1] As Petitioners point out, ICCTA eliminated former section 10103 (which had provided that the remedies specified

The legislative history confirms that in doing this Congress intended to continue to completely preclude state regulation of rail rates and practices. The House report stated that:

> The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

---

in the subtitle were cumulative of remedies under other laws, "except as otherwise provided under this subtitle"), and expressly stated in Section 10501(b) that the remedies provided under the rail part of Title 49 are "exclusive." Petition at 17-18. However, the legislative history of ICCTA confirms that the change was simply meant to confirm the scope of preemption that already existed. The Conference Report on ICCTA noted that "[f]ormer section 10103 dealt with remedies in all modes of transportation regulated by the ICC, but since 1980, former section 10501(d) and 11501(b), with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act." H. R. Conf. R. No. 104-422 at 167 (1995).

> H.R. Rep. No. 104-311, at 95-96 (1995) (emphasis in original).

The Senate report similarly stated that:

> [N]othing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill. . . . The railroad system in the United States is a nationwide network. . . . Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would waken [sic] the industry's efficiency and competitive viability.

S. Rep. No. 104-176, at 6 (1995).

This legislative history strongly supports the court of appeal's conclusion that none of the changes in ICCTA reduced the scope of Staggers Act preemption. App. 13a.

B. Petitioners' Claims

Petitioners are indirect purchasers of rail freight services. Their Consolidated Amended Complaint ("Complaint") asserts claims for damages under the antitrust laws of eighteen states and the District of Columbia (Count II); the unfair competition and consumer protection laws of fifteen states and the District of Columbia (Count III); and unjust enrichment theories under the law of twenty-five

states and the District of Columbia (Count IV). App. 129a — 136a.[2]

Petitioners' Complaint expressly challenges both the reasonableness of Respondents' conduct and the level of Respondents' rates for rail services. For example, the Complaint alleges that the Respondents' conduct was "unlawful and unfair" (App. 134a – 135a); that Petitioners "paid supra-competitive, artificially inflated prices for rail freight services" (App. 132a, 134a); and that Respondents used fuel surcharges as a means to raise rail rates "across the board" (App. 73a, 80a).

Petitioners' description of their claims in their Petition confirms that their state law claims are intended to challenge Respondents' rail prices. Petitioners explain that the theory stated in their Complaint is that Respondents used a percentage-based fuel surcharge "to achieve an across-the-board rate increase on unregulated traffic," and that Respondents used the fuel surcharge "as a way to increase revenue beyond the real increased cost of fuel...." Petition at 7-8.

C. The District Court Decision

The district court granted Respondents' motion to dismiss Petitioners' state law claims on the ground

---

[2] Numerous other related cases brought by direct purchasers of rail services under federal antitrust law were centralized by the Judicial Panel on Multidistrict Litigation and remain pending before Judge Friedman in the District Court for the District of Columbia. *In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL No. 1869, Misc. No. 1:07-MC-00489-PLF.

that they are preempted by ICCTA. Consistent with other courts that have examined ICCTA's preemption language, the court found that "'[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" App. 40a-41a (quoting *CSX Transp., Inc. v. Georgia Public Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). Citing the "plain and explicit" language of Section 10501(b), as well as the decisions of other courts interpreting the clause, the district court held that "for this Court to resolve plaintiffs' claims would require the application of different state antitrust and consumer protection laws to decide what defendants' fuel surcharges should have been – creating just the patchwork of railroad regulation that ICCTA sought to preempt." App. 43a-44a.

D. The D.C. Circuit Decision

The court of appeals affirmed the district court's ruling. Much of the court of appeals' opinion is directed to an argument that Petitioners do not make in their Petition. Petitioners' primary argument below was that the preemption provision in Section 10501(b) does not apply to rail freight transported under private contracts, which Congress exempted from federal regulatory requirements beginning with the Staggers Act and continuing with ICCTA. Under Petitioners' reading, such traffic would be subject to plenary state regulation, despite Congress's express deregulatory intent.[3] The court

---

[3] Although Petitioners identify this issue in their statement of the "Question Presented" in their Petition, other

of appeals held that Petitioners' reading of the statute was "plainly erroneous." App. 9a. Providing an exhaustive review of the statutory text, prior case law, and legislative history, the court demonstrated that Section 10501(b)'s preemption language applied to traffic moving by private contract, and that Congress, in further *deregulating* the rail freight industry with ICCTA, did not intend to open the door to state regulation of such traffic. App. 9a-15a.

The court of appeals also rejected what it characterized as Petitioners' "fallback" argument below (which is the sole argument that Petitioners make in their Petition) – *i.e.*, that their claims do not involve "regulation of rail transportation." App. 15a. The court discussed other circuits' opinions that have considered ICCTA preemption, and explained that those decisions establish that the "core" of ICCTA preemption is economic regulation of rail carriers. App. 16a-18a. The court held that, "[a]s pitched in this litigation," Petitioners' state law claims "would directly interfere with the ICCTA's deregulatory objectives," because those claims challenged the fairness of the railroads' contracts, including "the manner in which the rates were computed." App. 20a.

In so doing, the court noted that Petitioners' own pleadings confirmed that the relief they sought amounted to regulation of rail rates and practices. The court observed that Petitioners relied heavily in

---

than a passing reference to the court of appeals' discussion of the issue (Petition at 18-19, n.6) they make no argument concerning the issue in the body of their Petition. Petitioners' failure to support this purported question with any argument is sufficient reason to reject it as a ground for granting certiorari. Sup. Ct. R. 14.4.

the district court on a prior decision of the STB finding that rate-based fuel surcharges were an "unfair practice" with respect to traffic that remains under the STB's regulatory authority. And the court explained that Petitioners "made no bones about their goal of extending the remedies that the STB ordered for *regulated* freight to freight over which Congress deliberately stripped the STB – *and states* – of any regulatory authority." App. 21a (emphasis in original).

REASONS FOR DENYING THE PETITION

Petitioners make three arguments in favor of certiorari. First, they assert that there is a conflict among the lower courts over the preemptive scope of Section 10501(b). Second, they contend that the lower court's decision does not comport with the plain language of the statute. Finally, Petitioners suggest that the court of appeals erred in failing to discuss the "presumption against preemption." As demonstrated below, each of these arguments lacks merit, and, thus, there is no reason for this Court to grant certiorari.

I. THE D.C. CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT

Section 10501(b) gives the STB "exclusive" jurisdiction over transportation by rail carriers, including the remedies for the "rates" and "practices" of such carriers; and the statute expressly confirms that the remedies provided in ICCTA "with respect to regulation of rail transportation" are exclusive

and preempt any remedies under State law. 49 U.S.C. § 10501(b). Fuel surcharges indisputably involve rail carrier "rates" and practices, and adjudicating the reasonableness of those surcharges and awarding damages on that basis is quintessential "regulation." 49 U.S.C. §§ 10704 and 11704. The STB and the ICC before it have long applied the remedies in the statute to regulate both the railroads' practice of charging such surcharges and the reasonableness of those surcharges. *See, e.g., Rail Fuel Surcharges*, STB Ex Parte No. 661, 2007 WL 201205 (Jan. 25, 2007).

Petitioners are wrong in claiming that the court of appeals' decision conflicts with the decisions of other circuits. In fact:

All of the circuit courts that have addressed the issue agree that if a state law has the effect of regulating rail transportation, it is expressly preempted by Section 10501(b). *See, e.g., Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157-58 (4th Cir. 2010); *Franks Inv. Co. LLC v. Union Pac. R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010); *Adrian & Blissfield R.R. Co. v. City of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008); *Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1131-32 (10th Cir. 2007); *New York Susquehanna and W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007); *City of Lincoln v. STB*, 414 F.3d 858, 860-61 (8th Cir. 2005); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *Florida E. Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331-32 (11th Cir. 2001); *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998).

No court has allowed the application of state laws to assess the reasonableness of a railroad's rates

under ICCTA preemption. On the contrary, as the court of appeals correctly observed in its decision (App. 17a), the courts are clear that when it comes to "economic regulation," which is at the core of ICCTA's regulatory concern, state-law remedies are preempted. *See, e.g., Jackson*, 500 F.3d at 252 (core concerns of ICCTA preemption are "economics and finances" of the rail industry, including railroads' "rates, terms of service, [and] accounting practices"); *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) (items specifically listed in ICCTA and that have significant economic ramifications for railroads are covered by ICCTA preemption).

That the state law here would be applied by a judge and jury, rather than a state regulatory agency, makes no difference. As a general matter, this Court has repeatedly held that damages assessed by juries in civil lawsuits under general state statutes or common law can effectively exercise state regulatory power. *See, e.g., Riegel*, 552 U.S. at 323-34, citing *Medtronic v. Lohr*, 518 U.S. 470, 504 (1996), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (holding that a liability award "'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'") *See also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (holding that "[l]egal duties imposed on railroads by the common law fall within the scope" of preemption under the Federal Railroad Safety Act); *Morales*, 504 U.S. at 378-79 (holding that application of general state consumer protection laws to the fairness of airline fare advertising was preempted by the Airline Deregulation Act).

The courts applying ICCTA have likewise made clear that ICCTA preemption is as applicable to general state statutory or common law remedies applied by judges and juries as it is to the regulatory efforts of state or local governmental authorities. *See, e.g., Friberg,* 267 F.3d at 444 (ICCTA preemption cannot be "circumvented by allowing liability to accrue under state common law, where that liability arises from a railroad's economic decisions"); *Guckenberg v. Wisc. Cent. Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wisc. 2001) ("[S]tate regulation can be as effectively exerted through an award of damages as through some form of preventive relief"); *San Luis Cent. R.R. v. Springfield Terminal Ry. Co.*, 369 F. Supp. 2d 172, 177 (D. Mass. 2005) (ICCTA preempts state law tort and statutory claims regarding rail car service and car hire fees because an award of damages can "improperly serve to regulate rail transportation"); *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.*, 297 F. Supp. 2d 326, 333 (D. Me. 2003) ("[A]wards of damages pursuant to state tort claims may qualify as state 'regulation' when applied to restrict or burden a rail carrier's operations").

Petitioners cite no case that suggests that state-law remedies for "unreasonable" or 'unfair" railroad rates can avoid ICCTA preemption. They discuss only two circuit court cases, *Franks* and *City of West Palm Beach*, which they claim conflict with the decision below. Petition at 24-29. But there is no conflict at all. Neither of those cases suggests that the application of state laws to regulate core railroad functions—like the rates a railroad charges its shippers—can escape ICCTA preemption. *City of West Palm Beach* evaluated the application of zoning laws to a non-railroad's conduct of a business on

property it leased from a railroad. The Eleventh Circuit held that the non-rail carrier's activity was not within the ambit of Section 10501(b), because that section applied only to activities by "rail carriers." 266 F.3d at 1330.

Similarly, the Fifth Circuit in *Franks* held that the application of state property law to the closure of private crossings was not preempted, because the application of state law to that activity did not interfere with rail operations. 593 F.3d at 411-12. The court specifically distinguished the rail crossings at issue from the "significant" subjects listed in the exclusive jurisdiction portion of Section 10501(b), "dealing with the basics of the functions of railroads, *e.g.*, ***rates*** and routes." 593 F.3d at 409 (emphasis added). The court also specifically distinguished the situation it was evaluating from the other cases, including its own prior precedent, which had concluded that the maintenance of actions under state tort, environmental, or property laws were preempted because they would interfere with rail operations. *Id.* at 411 (discussing *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439 (5th Cir. 2001), *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), and *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005)).

The D.C. Circuit correctly concluded, consistent with the legal framework and outcomes of *Franks* and *City of Palm Beach*, that Petitioners' state law challenge to the reasonableness and fairness of rates charged to shippers amounted to state law regulation of a core aspect of federal rail transportation—rail rates and practices—that falls within ICCTA's express preemption clause. Accordingly, Petitioners' attempt to argue that the

D.C. Circuit applied a definition of "regulation of rail transportation" that is out of step with *Franks* and *City of West Palm Beach* is a red herring. Petition at 20, 22-23. Those courts suggested the "regulation of rail transportation" meant "managing or governing" rail transportation. *Franks*, 593 F.3d at 410; *City of West Palm Beach*, 266 F.3d at 1331. Far from adopting a definition of "regulation" that is different from these cases or other courts, the D.C. Circuit held that the state laws at issue here cut to the heart of that definition.[4] There is nothing in *Franks*, *City of West Palm Beach*, or any other case to suggest that regulation of a railroad's rates does not constitute "managing or governing" rail transportation.

Petitioners' avowed intention was to use state antitrust, consumer protection, and unjust enrichment claims to extend to unregulated contract traffic regulatory remedies that the STB had ordered for regulated freight traffic. App. 20a-21a. As the court of appeals properly held, it is impossible for Petitioners to claim that they do not seek to use state laws to "regulate" rail transportation, when they ***admit*** that they are trying to use damages to replicate the same kind of regulation that the STB has exercised for traffic within its regulatory authority. Rather, as the court of appeals concluded,

---

[4] The district court below reviewed the ICCTA preemption case law and cited *City of West Palm Beach*, among others, for the proposition that ICCTA preempts "all state laws that may reasonably be said to have the effect of managing or governing rail transportation." App. 42a. The court of appeals below cited the same authority for the proposition that economic regulation lies at the core of ICCTA preemption. App. 16a-17a.

when state-law unjust enrichment, consumer protection, and antitrust claims are "advanced as a means of challenging the substantive ***reasonableness*** of the rates charged under private contracts," they necessarily constitute state-law regulation preempted by ICCTA. App. 21a (emphasis in original).

In sum, far from presenting a conflict with other circuits, the decision below is completely congruent with the decision of ***every*** circuit that has addressed the scope of ICCTA preemption.

II. THE COURT OF APPEALS PROPERLY HELD THAT THE PLAIN LANGUAGE OF SECTION 10501(b) PREEMPTS STATE-LAW REGULATION OF RAILROAD RATES

Petitioners devote much of their petition to a contrived argument that the court of appeals ignored the plain language of Section 10501(b) in favor of a "purposes and objectives" analysis based on legislative history that Petitioners claim is inconsistent with the language of the preemption provision. Petition at 15-23. That is not correct. The legislative history supports the court of appeal's interpretation of the statutory language. In any event, most of the court of appeals' review of legislative history was to explain that Petitioners' ***own*** reliance on legislative history concerning the interplay between Section 10501(b) and Section 10709 was incorrect. App. 9a-15a. The court of appeals rejected Petitioners' argument that Section 10709 exempts contract rates from Section 10501(b), concluding that this argument was defeated not only by the express language of Section 10709, but also by

the legislative history of both the Staggers Rail Act of 1980 and ICCTA. *Id.* Petitioners make no attempt here to defend their argument below under Section 10709. *See supra*, note 3. Instead, they rely on their "fallback argument" below (App. 15a)—that their state law claims do not involve "regulation of rail transportation" within the meaning of Section 10501(b).

In reaching its conclusion that Petitioners' claims were preempted, the court of appeals, like the district court, evaluated the text of the statute and what other courts interpreting Section 10501(b) had held constituted "regulation" within the statutory context. They found that those courts recognized that the core of ICCTA preemption is "economic regulation." App. 16a-18a. They noted that other kinds of regulation, such as environmental regulation, may also be preempted by Section 10501(b), but in the realm of economic regulation, non-contractual state-law claims are indisputably "completely preempted" on the face of the statute. *Id.* The court of appeals looked to legislative history only to confirm what is apparent on the face of Section 10501(b)—that state-law regulation of a railroad's "rates" and "practices" is exactly what ICCTA was intended to preempt. App. 18a-19a. The legislative history supports the court of appeal's understanding of the statutory language, and the circuit court's consideration of that legislative history was perfectly proper.

At bottom, Petitioners do not have a complaint about the D.C. Circuit's method of interpreting the statute, but instead seek acceptance of a view that has been repeatedly rejected by the courts—namely, that ICCTA displaces only a narrow set of state laws

that are specifically directed to rail carriers. Petition at 14, 20, 30, 36. It is Petitioners' analysis, however, that is in conflict with prevailing precedent. As detailed above, courts and the STB have repeatedly rejected the idea that laws of general application that do not specifically target railroads cannot be preempted by ICCTA. Indeed, the great majority of cases finding ICCTA preemption involves state laws of general applicability.[5] The application of certain general laws may survive when they are applied to the activities of non-railroads (as in *City of West Palm*

---

[5] *See, e.g., City of Alexandria*, 608 F.3d at 154-55 (municipal land use and traffic laws); *Port City Properties v. Union Pacific R.R. Co.*, 518 F.3d 1186, 1187 (10th Cir. 2008) (tortious interference with business relations and defamation); *PCI Transp., Inc. v. Fort Worth & Western R.R. Co.*, 418 F.3d 535, 538 (5th Cir. 2005) (intentional interference with contractual relations); *City of Lincoln*, 414 F.3d at 858 (state condemnation law); *Green Mountain*, 404 F.3d at 639 (state environmental land use law); *Friberg*, 267 F.3d at 441 (common law negligence); *City of Auburn*, 154 F.3d at 1027-28 (state and local environmental land use laws); *Village of Ridgefield Park v. New York Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 67 (N.J. 2000) (municipal nuisance law); *Maynard v. CSX Transp., Inc.* 360 F. Supp. 2d 836, 841-42 (E.D. Ky. 2004) (common law nuisance claims); *Pejepscot*, 297 F. Supp. 2d at 333-34 (tortious interference and exemplary damages); *Rushing*, 194 F. Supp. 2d at 500 (state nuisance and negligence claims); *Guckenberg*, 178 F. Supp. 2d at 955 (common law nuisance claims); *City of Marshfield*, 160 F. Supp. 2d at 1011 (state condemnation law); *City of Minneapolis*, 38 F. Supp. 2d at 1097-98 (municipal historic preservation and demolition permitting laws); *North San Diego County Transit Dev. Bd.*, 2002 WL 1924265, at *2 (state environmental laws); *Friends of the Aquifer*, 2001 WL 928949, at *4 (state and local environmental laws); *Cities of Auburn and Kent*, 1997 WL 362017, at *5 (state environmental and local land use law).

Beach) or when they do not interfere with railroad operations (as in *Franks*), but the court of appeals properly held below that a railroad's rates to its shippers are central to its transportation function. App. 17a-18a. Contrary to Petitioners' suggestion, there is nothing "remote" or "incidental" about a state-law challenge to the "fairness" or "reasonableness" of rail transportation rates to shippers. It represents precisely the kind of balkanized state-law interference with rail transportation that Congress intended to preempt. App. 17a-21a.

Moreover, from the beginning, courts have held that when Congress mandated in Section 10501(b) that the "remedies" provided in ICCTA were "exclusive," it meant that those remedies were exclusive of any state law remedies that might be used to regulate rail transportation, regardless of whether a federal remedy was available to a particular plaintiff with a particular claim. *See Georgia Pub. Serv. Comm'n*, 944 F. Supp. at 1581.[6]

---

[6] This broad reading of the statute has been repeatedly endorsed by the courts. *See, e.g., Franks*, 593 F.3d at 449; *Green Mountain*, 404 F.3d at 645; *Railroad Ventures, Inc. v. STB*, 299 F.3d 523, 562-63 (6th Cir. 2002); *City of Auburn*, 154 F.3d at 1027-30; *City of Seattle v. Burlington N. R.R. Co.*, 41 P.3d 1169, 1171-72 (Wash. 2002); *Pejepscot*, 297 F. Supp. 2d at 332-33; *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 499 (S.D. Miss. 2001); *Guckenberg*, 178 F. Supp. 2d at 958-59; *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998); *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1295 (D. Mont. 1997); *North San Diego County Transit Dev. Bd.—Pet. for Dec. Order*, STB Fin. Dkt. No. 34111, 2002 WL 1924265, at *4-5 (Aug. 19, 2002); *Friends of the Aquifer—Pet. for Dec. Order*, STB Fin. Dkt. No. 33966, 2001 WL 928949, at

Finally, Petitioners imply that the court of appeals somehow erred in failing to focus on the definition of "transportation" in the statute, which references a wide range of rail facilities and services. Petition at 30; *see* 49 U.S.C. § 10102(9). It is difficult to ascertain Petitioners' point, but if they are implying that ICCTA preemption only applies to interference with physical train movements, such a suggestion would be belied by the plain language of the statute. Section 10501(b) specifies that the STB's jurisdiction over "transportation by rail carriers" ***and*** "the ***remedies provided in this part*** with respect to ***rates***, classifications, rules (including car service, interchange, and other operating rules), ***practices,*** routes, services, and facilities of such carriers . . . is ***exclusive***," ***and*** "the ***remedies provided under this part with respect to regulation of rail transportation*** are ***exclusive*** and preempt the remedies provided under Federal or State law" (emphasis added). Thus, Section 10501(b) expressly gives the STB exclusive jurisdiction over any "remedy" for a railroad's rates and practices, ***as well as*** more generally preempting any state-law remedy that would effectively regulate rail transportation. The courts have repeatedly endorsed this broad view of the statute. *See supra*, note 6, and accompanying text.[7]

---

*3-4 (Aug. 10, 2001); *Cities of Auburn and Kent, WA—Pet. for Dec. Order—Burlington N. R.R. Co. Stampede Pass Line*, STB Fin. Dkt. No. 33200, 1997 WL 362017, at *7 (July 1, 1997).

[7] Further, as discussed above, the courts have specifically observed that rates and other economic regulatory matters are at the core of ICCTA preemption. *Franks*, 593 F.3d at 409; *Jackson*, 500 F.3d at 252; *Friberg*, 267 F.3d at 443; App. 16a-18a. If ICCTA preempted only state-law interference with

III. THE PRESUMPTION AGAINST PREEMPTION DOES NOT APPLY TO RAIL REGULATION, AND EVEN IF IT DID, IT WOULD HAVE NO BEARING ON THE OUTCOME OF THIS CASE

Petitioners also attempt to manufacture an issue worthy of review by arguing that the court of appeals erred in not addressing "the presumption against preemption" when evaluating the preemptive effect of Section 10501(b) in this case. The first answer to this complaint, as this Court has emphasized, is that there is no presumption against preemption when a state legislates in an area where there has been a significant federal presence. *United States v. Locke*, 529 U.S. 89, 108 (2000). The district court specifically recognized the federal government's historic regulation of the railroad system and held that it "counsels against [a presumption of non-preemption] in this case." App. 41a n.4 (citing *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (quoting *Locke*, 529 U.S. at 108, and also citing *City of West Palm Beach*, 266 F.3d at 1327-28)). *See also City of Alexandria*, 608 F.3d at 160 n.12; *Railroad Ventures, Inc.*, 299 F.3d at 562; *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 648 (E.D. Mich. 2000).

Contrary to Petitioners' suggestion, there is no tension between the district court's analysis and the

---

physical train movements, then states would be free to apply common law remedies to "supplement" the STB's exclusive rate reasonableness jurisdiction over regulated or exempt freight traffic. Even Petitioners do not claim such state-law regulation is permitted by the statute. App. 2a n.1.

Eleventh Circuit's application of the presumption in *City of West Palm Beach*. As discussed above, the Eleventh Circuit was addressing the application of zoning laws to a party that was not a railroad using property leased from a railroad for "non-rail transportation purposes." 266 F.3d at 1330-31. In contrast, as the district court and the court of appeals both determined below, the regulation of railroad rates, which is the subject at issue here, is at the core of the federal government's historic responsibility. App. 17a-18a, 41a-42a.

Moreover, the application of a presumption against preemption would have had no impact on the outcome of this case. Where Congress's preemptive intent is clear from the statutory language, the presumption against preemption is irrelevant. *See, e.g., City of Auburn*, 154 F.3d at 1031 fn. 7 ("When a court finds the terms of a statute unambiguous, judicial inquiry is complete") (citing *Rubin v. United States*, 449 U.S. 424, 430 (1981). The language in the statute would still preempt the state laws at issue. Also, as discussed in Part I above, the circuit courts have uniformly held that state and local laws that have the effect of regulating rail transportation are preempted by ICCTA. This includes cases involving environmental, zoning, negligence, and other laws that traditionally have been the province of States and local governments.[8] Therefore, the application of the presumption against preemption in the area of railroad rates to shippers, where the federal government has long been dominant, would have no bearing on the result. The statute would still preempt the state laws at issue here on its face,

---

8 *See supra*, note 5.

for as both the district court and court of appeals emphasized, Petitioners' state law claims challenging rail carrier rates implicate the core concern of ICCTA's express preemption clause. App. 47a (citing *Jackson*, 500 F.3d at 252); App. 17a (same).

In this regard, it is noteworthy that in the analogous areas of national air and truck transportation, the Court has repeatedly found that state laws that would interfere with the congressional scheme of regulation and deregulation of those industries were preempted—without any discussion of a presumption against preemption. *See American Airlines, Inc.*, 513 U.S. at 222; *Morales*, 504 U.S. at 378-79. This was so even though the state laws at issue were consumer fraud and consumer-protection laws of general applicability. *American Airlines, Inc.*, 513 U.S. at 227; *Morales*, 504 U.S. at 386.[9] *See also Rowe*, 552 U.S. at 370-74 (applying *American Airlines, Inc.* and *Morales* to preempt state-law regulation of motor carriers, and

---

[9] Consistent with *American Airlines, Inc.* and *Morales*, the Airline Deregulation Act has also been found to preempt the application of state antitrust laws to airline pricing practices. *See In re Korean Air Lines Co. Antitrust Litig.*, 567 F. Supp. 2d 1213, 1220 (C.D. Cal. 2008) (finding that civil antitrust claims for damages constituted regulation of "the manner by which Defendants set fares, or components of fares, for air transportation services"); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MD-06-1775, 2008 U.S. Dist. LEXIS 107882, at * 113 (E.D.N.Y. Sept. 26, 2008) (report and recommendation adopted by district court on Aug. 21, 2009) (preempting state law antitrust and consumer protection claims brought by indirect purchasers challenging the "manner in which the defendants set prices, or components of prices, for airfreight shipping services").

emphasizing that the application of a patchwork of state service-related laws to the national motor carrier industry would undermine Congress' preemptive mandate).

In none of these three decisions did the Court concern itself with the presumption against preemption. Given the clarity of the express preemption provision and the long-standing regulation of national air and motor transportation, the presumption against preemption was irrelevant to the outcome of those cases. In this case, citing *Morales* and the Airline Deregulation Act, the district court below correctly noted that "[w]ith similarly broad language, ICCTA preempts state laws with 'respect to regulation of rail transportation.'" App. 47a (quoting 49 U.S.C. § 10501(b)).

In sum, the presumption against preemption has no bearing on the outcome of this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: November 9, 2010

Respectfully submitted,

ALAN M. WISEMAN
Counsel of Record
THOMAS A. ISAACSON
PETER A. BARILE III
HOWREY LLP
1299 Pennsylvania
Avenue, NW
Washington, DC 20004
(202) 783-0800
wisemana@howrey.com

TYRONE R. CHILDRESS
DAVID G. MEYER
HOWREY LLP
550 South Hope St., Suite 1100
Los Angeles, CA 90071
(213) 892-1800

Counsel for Respondent Union Pacific Railroad Company

RICHARD J. FAVRETTO
ROBERT M. JENKINS III
GARY A. WINTERS
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Respondent BNSF Railway Company

KENT A. GARDINER
KATHRYN D. KIRMAYER
DAVID D. CROSS
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2500

Counsel for Respondent CSX Transportation, Inc.

JOHN M. NANNES
TARA L. REINHART
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000

SAUL P. MORGENSTERN
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

Counsel for Respondent
Norfolk Southern Railway
Company